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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-422

E. C. DOTHARD, et al.,

Appellants,

v.

BRENDA M. MIETH, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA

MOTION TO DISMISS OR AFFIRM

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Pursuant to Rule 16 of the Rules of this Court, Appellee Dianne K. Rawlinson moves that the order of the district court be affirmed or, in the alternative, that the appeal be dismissed.

STATEMENT

This is a direct appeal from that portion of

a decision of a three-judge district court holding height and weight requirements for prison guards and the exclusion of women from certain guard positions[1/] violative of the statutory proscription against sex discrimination in employment contained in 42 U.S.C. § 2000e-2 (Title VII).[2/]

Since the court below correctly applied established Title VII principles, no substantial question is presented by this appeal.

1/ The challenged height and weight requirements were imposed by statute. The statute is set forth in Appendix C of the Jurisdictional Statement, pp. 52-54. The exclusionary assignment policy was contained in Administrative Regulation 204, which is reproduced in Appendix D of the Jurisdictional Statement, pp. 55-57.

2/ The court below considered sex discrimination claims involving the employment of both prison guards and state troopers. Dianne Rawlinson, who challenged height and weight requirements for prison guards and the failure to assign females to contact positions within all-male penitentiaries, had perfected the procedural steps necessary to state a claim under Title VII. Brenda Mieth's claim, which challenged height and weight requirements for state troopers and the exclusion of women from the trooper force, arose under 42 U.S.C. § 1983 and was therefore decided on equal protection grounds. Since the trooper defendants have not appealed, only the correctness of the Title VII ruling is before this Court.

THE FACTS OF THE CASE

Appellants' statement of the facts is substantially correct. Since it is incomplete as to several essentials, however, the following additional information is presented.[3/]

It is undisputed that appellee was rejected as a candidate for employment as a prison guard solely because she was five pounds under the statutory minimum of 120 pounds. (J.S. 5.) She possesses a valid Alabama driver's license and has no physical defects. Moreover, her "educational credentials . . . are impressive and ideally suited for a career in corrections." (Slip. Op., J.S. 27.)

While appellants point out that the statute provides for a possible waiver of the physical requirements, they neglect to add that the Board of Corrections has never requested a waiver, has no standard procedure to inform the applicant of his or her right to request a waiver and did not so

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3/ Throughout this Motion, "J.S." refers to appellants' Jurisdictional Statement and "Slip. Op." to the Memorandum Opinion of the court below.

inform Ms. Rawlinson. (Slip. Op., J.S. 30.) Moreover, the administrative practice of Defendant Peace Officers Standards and Training Commission in acting upon waiver requests fails to comport with fundamental fairness. (Slip. Op., J.S. 42.)

The statistical evidence amply demonstrates that the challenged height and weight requirements have a disproportionate impact on women. The 5'2" height requirement operates to exclude 33.29 percent of the women in the United States between the ages of 18-79, while excluding only 1.28 percent of the males. The 120 pound weight minimum excludes 2.35 percent of the males and 22.29 percent of the females in this 18-79 age group. When the height and weight restrictions are combined, nearly 100 percent of the men meet both qualifications as opposed to only 58.87 percent of the women. (Slip. Op., J.S. 32.)

The only testimony offered by appellants in support of the height and weight minimums was that of Defendant Locke, Commissioner of the Board of Corrections. His sole contention concerning the job relatedness of these physical requirements was

that they were related to strength. (Slip. Op., J.S. 40.) Plaintiffs, on the other hand, submitted testimony from two expert witnesses, Mr. Raymond Nelson and Mr. Robert Sarver. Mr. Nelson, who has 20 years experience in the corrections field, is presently Warden at the Metropolitan Correctional Center in Chicago, where no height and weight minimums for prison guards are imposed. Mr. Sarver served as the Commissioner of the Arkansas Department of Corrections and the Department of Corrections for West Virginia. The latter also did not impose height and weight minimums. Both Mr. Nelson and Mr. Sarver testified that height and weight requirements have absolutely no relationship to the duties performed by a prison guard. (Slip. Op., J.S. 40-41.)

Administrative Regulation 204, struck down along with the height and weight requirements, allowed for selective appointment of male and female prison guard applicants, thereby implementing appellants' policy of not hiring women in contact positions in all-male penitentiaries. Although

the Jurisdictional Statement implies that Regulation 204 was promulgated pursuant to advice from Abner Sibal, General Counsel to the Equal Employment Opportunity Commission,[4] the record establishes that the letter reproduced by appellants was in error and was duly corrected by Mr. Sibal.[5]

Since women were not employed in contact positions, they comprised only 3.8% of the guard force at the four all-male penitentiaries, where 77.24 percent of the total force were employed. (Slip. Op., J.S. 32.) Women, however, made up 30 percent of the guard force in contact positions at the non-penitentiaries in the Alabama Prison System. (Slip. Op., J.S. 26-27.)

Appellants offered no expert testimony to sustain the exclusion of women from contact positions

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4/ *See* Appendix D of the Jurisdictional Statement, pp. 57-63, where an undated letter from Mr. Sibal to Defendant Locke is reproduced. It should be noted that although appellants refer to "advisory opinions" of the EEOC (J.S. 3), Mr. Sibal expressly states that "this is not an opinion letter. . . ." (J.S. 58.)

5/ Letter from Mr. Sibal to Pamela S. Horowitz reproduced, *infra*, pp. 1a-2a.

in the all-male penitentiaries other than the testimony of their own employees. The latter claimed that women would not be able to perform adequately and safely and that prisoners' right of privacy would be violated. Notably absent, however, was any objective, demonstrable evidence that women could not perform the duties associated with the job. Moreover, the record showed that the women guards employed in contact positions at the non-penitentiaries performed the identical duties of their male counterparts. (Slip Op., J.S. 44.) In addition, plaintiffs' experts testified that the presence of women in all-male prisons contributes to the normalization of the prison environment, which has an advantageous psychological effect upon the prisoners. (Slip. Op., J.S. 44.) Accordingly, a recent policy statement by the Federal Bureau of Prisons states:

> The Bureau of Prisons is committed to the goal of normalization as a part of improving the correctional facilities. The integration of staff of both sexes into all institutions will promote this development. 6/

ARGUMENT

A. The district court's application here of familiar Title VII principles does not warrant plenary review by this Court.

The Jurisdictional Statement avers that "a substantial federal question is involved because a three-judge district court has held to be unconstitutional a state statute and a state administrative regulation." (J.S. 9.) Even if a holding of unconstitutionality were before this Court, that fact alone would not warrant plenary review. If it did, this Court could be forced to review every constitutional ruling handed down by a three-judge district court, which would impose an intolerable burden upon this Court's docket.

In any event, as the very next sentence of the Jurisdictional Statement indicates,[7] the

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6/ Federal Prison System, Policy Statement No. 3713.7, dated January 7, 1976. (Slip Op., J.S. 45.)

7/ "Both the statute and regulation were stricken on the basis of findings of sex discrimination against women under Title 42 U.S.C., § 2000e-2." (J.S. 9.)

statutory provision and administrative regulation at issue here were not held to be unconstitutional. They were invalidated pursuant to Title VII's prohibition against sex discrimination. The questions presented in this case thus involve the application of familiar Title VII principles. As such, they do not warrant plenary review by this Court.

B. The court below correctly held that plaintiff had demonstrated a prima facie case of sex discrimination.

The evidence in this case establishes that the challenged height and weight requirements have a substantially disproportionate impact on female applicants. The statistics show that the 5'2", 120 pound requirement excludes 41.13 percent of the female population while excluding less than one percent of the male population. (Slip Op., J.S. 35.)

Prior decisions of this Court establish that, under Title VII, a prima facie case of discrimination is made out upon a showing that an employment requirement operates to exclude a dispropor-

tionately larger number of women than men.[8]

C. The court below correctly held that both the height and weight requirements and the facially discriminatory assignment policies are impermissible under Title VII.

Once a Title VII plaintiff has demonstrated a prima facie case of discrimination, the burden shifts to the employer to prove that the disqualifying employment practice has a "manifest relationship to the employment in question."[9] Even if the employer articulates a legitimate reason for its challenged practice sufficient to meet the prima facie case, the employee may prove that the challenged requirement is but a pretext for

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8/ *See, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424 (1971). Defendants' reliance on Geduldig v. Aiello, 417 U.S. 484 (1974), and Smith v. Troyan, 420 F.2d 492 (6th Cir. 1975), is misplaced. Both of those cases involved the fourteenth amendment, not Title VII. The *Smith* court, noting that "absent in plaintiff's complaint, . . . were references to Title VII of the Civil Rights Act of 1964," observed, "[W]hat Title VII compels may differ from what the equal protection clause, in itself, compels." (At 493.) This observation was borne out by this Court's recent decision in Washington v. Davis, ____U.S.____, 48 L.Ed 2d 597 (June 7, 1976).

9/ Griggs v. Duke Power Co., *supra*, at 432.

discrimination by showing that other selection devices which do not have a discriminatory impact would serve the employer's interest in "efficient and trustworthy workmanship."[10]

As discussed, *supra*, the sole contention offered by defendants in support of their height and weight requirements was that they were related to strength. They failed to prove, however, that a person below the arbitrarily defined level of 5'2" and 120 pounds would invariably lack the necessary strength to perform the required tasks. (Slip Op., J.S. 40.) Plaintiffs submitted testimony from two expert witnesses that height and weight requirements have absolutely no relationship to the duties performed by a prison guard. (Slip Op., J.S. 40.) Moreover, as the district court noted, "If strength is an important qualification for a prison guard, then the Board of Corrections should adopt a test for its applicants that does in fact measure

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10/McDonnell Douglas Corp. v. Green, 411 U.S. 792, 801 (1973). *Accord*, Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975).

strength." (Slip Op., J.S. 41.)

The court below thus correctly stated the applicable rules regarding burden of proof, and on the record before it, correctly held that the height and weight requirements impermissibly discriminate against women in violation of Title VII.

In defense of Regulation 204, defendant prison administrators testified that women would be unable to perform adequately and safely in contact positions in all-male penitentiaries. Defendants failed, however, to offer any objective, demonstrable evidence that women could not perform the duties associated with the job.[11/] Indeed, plaintiffs

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11/ Title VII provides that "it shall not be an unlawful employment practice for an employer to hire and employ employees, . . . on the basis of . . . sex . . . in those certain instances where . . . sex . . . is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, ..." 42 U.S.C. § 2000e-2(e). Courts, however, have treated the bfoq doctrine as a narrow exception to the general rule that there must be equality of employment opportunities. Thus, labeling a job as "strenuous" and then relying on stereotyped characterizations of women will not meet the burden of demonstrating a bfoq. Weeks v. Southern Bell Telephone & Telegraph Co., 408 F.2d (cont'd)

established that defendants employed women in contact positions at all-male institutions other than the penitentiaries and that these women performed the same duties as their male counterparts. (Slip Op., J.S. 44.) In addition, plaintiffs' experts testified that the presence of women in all-male prisons contributes to the normalization of the prison environment, which has a positive psychological effect upon the prisoners. (Slip Op., J.S. 44.)

Defendants also attempted to justify Regulation 204 by advancing the prisoners' right of privacy. Apart from the fact that this position was totally inconsistent with defendants' employment of women in contact positions in the non-penitentiaries, the court below found that the concern for inmate privacy could be alleviated by procedures short of denying women the job.[12/]

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228 (5th Cir. 1969). There must be some objective, demonstrable evidence that women cannot perform the duties of the job in question. *See* Weeks, *supra*, at 236.

12/ The court suggested that defendants could designate selective work responsibilities. This would mean, for example, that female guards would (cont'd)

Having analyzed Regulation 204 in accordance with appropriate Title VII standards, the court below correctly concluded that, insofar as it denies women the opportunity to work as guards in all-male penitentiaries, the Regulation violates Title VII.

CONCLUSION

For the reasons herein stated, the order of the district court should be affirmed or, in the alternative, the appeal should be dismissed.

Respectfully submitted,

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not conduct strip searches. Warden Nelson testified that this procedure is utilized successfully at his prison, and the evidence showed that only a small percentage of the guard force at the Alabama penitentiaries is involved in conducting systematic strip searches. (Slip Op., J.S. 45.)

APPENDIX

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

WASHINGTON, D.C. 20506

Pamela S. Horowitz, Esquire
The Southern Poverty Law Center
1001 South Hull Street
Montgomery, Alabama 36101

Dear Ms. Horowitz:

This is in reply to your letter dated February 18, 1976, in which you offer several observations regarding a December 18, 1975, letter sent by this office to Mr. J. C. Locke, Jr., Commissioner of the Board of Corrections of the State of Alabama. Please be advised that through an oversight a segment was inadvertently omitted from the following sentence:

> It is suggested that the State of Alabama, wherever possible, continue to employ male correctional personnel at all-female correctional institutions.

This sentence was intended to have read:

> It is suggested that the State of Alabama, wherever possible, continue to employ male correctional personnel at all-female correctional institutions and female correctional personnel at all-male correctional institutions.

It is also noted that the case of City of Philadelphia v. Pennsylvania Human Rights Commission should be cited at 5 EPD ¶8535 not ¶8538.

We thank you for bringing this matter to our

attention. A copy of this letter has been sent to Mr. Locke, so that he may make the appropriate correction to the December 18, 1975, letter.

Sincerely,

s/ Abner W. Sibal /wlr
Abner W. Sibal
General Counsel

cc: Mr. J. C. Locke, Jr.